41484-8

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

State of Washington
Respondent

v.

KAREN L. MOWER
Appellant

41484-8

On Appeal from the Superior Court of Mason County

08-1-00018-4

The Honorable Amber Finlay

BRIEF OF APPELLANT

Jordan B. McCabe, WSBA No. 27211
Attorney for Appellant Karen L. Mower

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Washington Cases

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II. ASSIGNMENTS OF ERROR & ISSUES

A. Assignments of Error

1. The evidence was insufficient to convict Appellant of manufacturing marijuana.

2. Appellant's arrest was unlawful.

3. Evidence obtained during the unlawful arrest should have been suppressed.

4. Appellant was denied the effective assistance of counsel in violation of the Sixth Amendment and Wash. Const. art.1, § 22.

5. The court violated the Sixth and Fourteenth Amendments and Const. art. 1, § 22 and relieved the State of its burden of proof beyond a reasonable doubt by instructing the jury Appellant had the burden to prove the affirmative medical marijuana defense by a preponderance of the evidence.

6. The court failed to give a unanimity instruction regarding which element of the affirmative defense the State had refuted beyond a reasonable doubt.

7. Appellant was denied the opportunity to present a complete defense in violation of the Sixth Amendment.

8. The sentencing court exceeded its authority under the Sentencing Reform Act by imposing community custody.

9. The sentencing court unlawfully imposed exorbitant costs.

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B. Issues Pertaining to Assignments of Error

1. Was the evidence sufficient to convict Appellant of manufacturing marijuana where the State presented no evidence that Appellant participated the grow operation by any means other than her presence and acquiescence?

2. Did the police unlawfully arrest Appellant by ignoring an unequivocal invocation of the medical marijuana act and arresting her before executing the search warrant for her home?

3. Was defense counsel ineffective for not moving to suppress marijuana obtained during the unlawful arrest?

4. Did the court unlawfully shift the burden of proof by instructing the jury Appellant had to prove the medical marijuana defense by a preponderance of the evidence?

5. Was a unanimity instruction required where the State disputed multiple elements of the medical use defense?

6. Did the court deny Appellant and her Co-Defendant the right to present a complete defense in violation of the Sixth Amendment and art. 1, § 22 by sua sponte excluding evidence tending to prove the defendants tried to stay within the law in using medical marijuana?

7. Did the sentencing court erroneously conclude it lacked discretion under the Sentencing Reform Act not to impose community custody?

8. Did the sentencing court violate RCW 10.01.160(2) by billing Appellant routine costs of operating the Sheriff's Office?

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II. SUMMARY OF THE CASE

In these consolidated appeals, Karen Mower and John Reed appeal their convictions for cultivating medical marijuana following a trial that was conducted before the Legislature overhauled the Medical Marijuana Act. (See Chapter 181, Laws of 2011, eff. date 7/22/2011.) The jury found them not guilty of possession with intent to deliver, but rejected their medical use defense to cultivation.

The primary questions presented are whether the police unlawfully arrested Mower and Reed so that the physical evidence should have been suppressed; whether the evidence is sufficient to convict Ms. Mower of possession; and whether the jury was correctly instructed on the burden of proof regarding the medical use defense.

In addition, Mower challenges certain evidentiary rulings. She also disputes certain elements of the sentence, specifically, the imposition of community custody and the assessment of excessive costs.

III. STATEMENT OF THE CASE

The Mason County police received an anonymous tip that Appellant Karen Mower and her husband,[1] John Reed, were growing marijuana on their property. RP 352. The police corroborated the tip by conducting a walk-around during which they detected the odor of green

[1] Reed and Mower were married in 1996. RP 756.

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marijuana. RP 362. They obtained a search warrant and raided the home in the afternoon of January 14, 2008. RP 528-29.

The police drove up in several cars and swarmed the residence with guns drawn. RP 529. Mower and Reed emerged from a small travel trailer, and the police presented the warrant. The police immediately seized Mower and Reed at gunpoint and handcuffed them. RP 291-92; RP 589.[2]

Mr. Reed immediately informed the officers that the couple were authorized to grow marijuana for medical use. RP 359-60, 402, 589. Ms. Mower also told the police that they were lawfully growing medical marijuana. RP 523. The officers ignored this information. They did not release Mower and Reed and did not question them about their medical status. Instead, they kept the pair in handcuffs and proceeded to execute the search warrant. RP 531, 589.

Reed led the officers on a tour of the grow house, a structure that could have been a house or garage with several rooms in which marijuana plants were growing. RP 590. Marijuana was present in various stages of preparation, including seedlings, mature budding plants, and packaged marijuana. RP 304, 389.

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[2] It was standard procedure to enter property with weapons drawn when serving a search warrant. RP 292, 295.

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During the search, police found a medical marijuana authorization in the trailer, issued in 2004. RP 336, 342. Nevertheless, the police charged Mower and Reed with criminal violations. Both were charged with one count of unlawfully manufacturing marijuana and one count of possessing marijuana with intent to deliver. CP 136-37; RP 869-70.

At their joint jury trial, the couple asserted the affirmative defense of lawful use under the medical marijuana act, RCW 69.51A. RP 34.

The trial was delayed for some months, partially because Mason County was electing new judges. RP 41. The Hon. Amber Finlay, who presided over this case was one of the new judges.[3]

The court heard many hours of argument and offers of proof as the defense attempted to persuade the court of their prima facie showing of the medical use defense.[4] The court initially rejected the defense. RP 158 Eventually, the court reconsidered and agreed that Mower and Reed had made a sufficient prima facie showing to establish their right to assert the defense. RP 221.

The evidence showed that both defendants suffered from an array of fairly horrendous debilitating medical conditions. RP 107, 108, 674-75.

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[3] Judge Finlay was a commissioner on Sept. 8, 2008. RP 33

[4] Attorney David Hiatt, specializes in the medical use defense. R 25. He officially appeared as counsel for Reed. RP 17-18. Mr. Hiatt conducted trial for both defendants, although Mower's counsel of record throughout was Ronald Sergi of the Public Defender's office. RP 21.

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Of particular significance was that both had active Hepatitis C, which is a qualifying condition under RCW 69.51A. RP 102. Ms. Mower also suffered from inoperable ovarian cancer, and end-stage cirrhosis of the liver with associated esophageal varices. RP 683. She could barely walk; she was dying. RP 36, 100, 675-76.

Prior to the raid, Mower had obtained medical marijuana authorizations from several doctors, including Orvald on February 8, 2008; Ron Stallings on May 14, 2004, and David Dodge on December 2, 2003. RP 684. After they were charged, Mower and Reed obtained supplemental authorizations for their marijuana use from a couple of health care professionals. One of these, Dr. Carter, a world-renowned expert in the medical use of cannabis-derived compounds, would testify as an expert witness for the defense.

In addition to trying to discredit Dr. Carter, RP 975 the prosecutor also impugned the professional integrity of Dr. Orvald, one of the physicians from whom Mower and Reed had obtained medical marijuana authorizations in previous years. The defense offered several documents to refute the State's insinuations of bad faith. RP 748. Mr. Reed had exchanged several letters in 2004 with a California lawyer (now a judge) regarding couple's legal position. The letters stated counsel's opinion that Mower and Reed were in compliance with the law. RP 748. Mr. Hiatt

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emphasized that these letters were not offered to prove that Mower and Reed were in compliance with the law. Rather than the truth of the matter asserted, the documents were offered solely as evidence tending to establish Reed's and Mower's good faith. RP 749.

The court summarily rejected this evidence on its own motion, without even waiting for an objection or argument from the State. Assuming the role of prosecutor, the court argued that the documents were inadmissible hearsay that likely would confuse the jury. RP 749.

Erroneous Jury Instructions: The court's instructions to the jury were seriously flawed.[5]

The court eventually was satisfied the defense had made out a prima facie case for the medical use defense. RP 846. The court nevertheless instructed the jury that the defendants had the burden to prove the defense by a preponderance of the evidence. Instr. 14, CP 45. (Reed's counsel and the prosecutor both thought this was the standard, and

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[5] Inexplicably, the court ruled that the jury could not consider the medical use defense with respect to the possession charge. The State was alleging the marijuana was possessed not for medical use but with intent to deliver. The court concluded that alleging intent to deliver as an element removed the possession charge from the medical marijuana act and effectively eliminated the medical use affirmative defense. The court reasoned that if the jury found intent to deliver, then medical use was not a defense, while if the jury found no intent to deliver, then the defense was superfluous. RP 869-82. This is not an issue on appeal because the jury acquitted on the possession with intent to deliver charge. It is typical, however, of the quality of jurisprudence that prevailed at this trial.

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Mower's counsel did not voice any exception. RP 823.) The prosecutor specifically distinguished the medical use defense from the affirmative defense of self-defense in a homicide prosecution, which the State must disprove beyond a reasonable doubt once the defense establishes its prima facie case. RP 824. The State emphasized in closing argument that the burden was on the defense. RP 977.

In addition, the court did not instruct the jury it must be unanimous as to which element of the medical use defense was not proven, although the prosecutor disputed multiple elements of the defense. The State urged the jury to find that Mower's medical conditions, while appalling, were insufficient to prove that she was a qualifying patient because she had not clearly demonstrated intractable pain or nausea that could not be treated by standard therapies. RP 837, 914, 976-77. The State also argued that the couple had failed to demonstrate that the quantity of marijuana in their possession did not exceed a 60-day supply. RP 978, 980. Finally, the State argued that the affirmative defense failed unless Mower and Reed satisfied the requirement that they present valid documentation when questioned by the police. RP 981.

The jury acquitted both defendants of possession with intent to deliver, but convicted them of manufacturing. CP 25-26, RP 1031. The jury did not receive any sort of unanimity instruction, so it cannot be

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discerned from the verdict which, if any, of the various elements of the medical use defense the jury agreed was lacking. CP 29-61.

Lifelong law-abiding citizens, both had a zero offender score so that their standard range sentence was 0 – 6 months. CP 7-8.

The court sentenced Mower to 20 days, all converted to community service. CP 9. The court was deeply concerned that Ms. Mower was too sick to comply with any conditions. But the judge believed the court had no choice but to consign Mower to the supervision of the Department of Corrections (DOC) for a one-year term of community custody. The court did so, but stayed execution of the judgment pending appeal, expressing the hope that this Court could devise some way to spare Ms. Mower from the hardship inherent in even the mildest sentence. Mower contends this Court can do just that. Please see Issue 7.

The court also included in Mower's Judgment the entire bill for the 13 or more times the Sheriff's Office repeated service of subpoenas necessitated by the interminable continuances of the trial. The service fees totaled $2,135. CP 12.

Mower filed this timely appeal. CP 5.

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IV. ARGUMENT

1. THE EVIDENCE IS INSUFFICIENT TO CONVICT MOWER FOR MANUFACTURING MARIJUANA.

A defendant's due process right to require that the State prove each essential element of a crime beyond a reasonable doubt is guaranteed under the United States Constitution. U.S. Const. amends. V, XIV; *In re Winship,* 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Baeza,* 100 Wn.2d 487, 488, 670 P.2d 646 (1983). This Court will review the sufficiency of the evidence for the first time on appeal. *State v. Alvarez,* 128 Wn.2d 1, 13, 904 P.2d 754 (1995).

Evidence is not sufficient to support a conviction unless any rational fact finder could find the essential elements of the crime beyond a reasonable doubt when viewing the evidence in the light most favorable to the State. *State v. Thomas,* 150 Wn.2d 821, 874, 83 P.3d 970 (2004). A sufficiency challenge admits the truth of the State's evidence and all inferences reasonably to be drawn from it. *Thomas,* 150 Wn.2d at 874. As a matter of law, insufficient evidence requires dismissal with prejudice. *State v. Stanton,* 68 Wn. App. 855, 867, 845 P.2d 1365 (1993).

At the close of the State's case, Ms. Mower's counsel moved to dismiss the case against her for insufficient evidence. The court denied this motion. But the State had presented not one whit of evidence that

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Mower committed a single act that could be construed as participating in cultivating the marijuana plants.

Reed testified that Mower had no clue how to grow anything and lacked even rudimentary cultivation skills. Besides that, Mower was too sick to engage in any of the physical labor involved in cultivation. RP 764. Reed testified that he did everything. RP 764, 788, 802. The State presented not a shred of evidence to refute this. No evidence linked Mower to a single activity in the grow house except showering and watching TV. RP 803. Every item associated with Mower was inside the trailer. RP 328. The court was under the mistaken impression that Ms. Mower and Mr. Reed came out of the grow house together when the police arrived to conduct the raid. RP 640. This is incorrect. Mower and Reed came out of the trailer. RP 279, 290.

Where the State lacks any evidence that a defendant actually committed a crime, it may attempt to convict the person as an accomplice. RCW 9A.08.020. A person is liable as an accomplice if, with knowledge that it will promote or facilitate the commission of a crime, she "aids or agrees to aid" another person in planning or committing it." RCW 9A.08.020(3) (a) (i –ii). Awareness and physical presence at the scene of an ongoing crime — even when coupled with assent — do not make a person an accomplice, unless the person stands "ready to assist" in the

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crime. *In re Welfare of Wilson,* 91 Wn.2d 487, 491, 588 P.2d 1161 (1979).

Mower's jury received an accomplice instruction. Instr. 5, CP 36. But the State did not establish accomplice liability, because it offered no evidence showing more than that Ms. Mower was present, that she knew about the grow, and that she assented to it. This may be enough to justify a parent punishing two siblings for the transgressions of one of them, but it is insufficient in a court of law to convict a person of an offense committed by another.

Retrial following reversal for insufficient evidence is 'unequivocally prohibited' and dismissal is the remedy." *State v. Hickman,* 135 Wn.2d 97, 103, 954 P.2d 900 (1998), quoting *State v. Hardesty,* 129 Wn.2d 303, 309, 915 P.2d 1080 (1996). The evidence is insufficient to prove guilt beyond a reasonable doubt. Accordingly, the remedy is to reverse Mower's conviction and dismiss the prosecution.

2. THE EVIDENCE AGAINST MOWER WAS INADMISSIBLE FRUIT OF HER UNLAWFUL ARREST.

Both the federal and state constitutions prohibit warrantless arrests unless the arrest is supported by probable cause. *State v. Solberg,* 122 Wn.2d 688, 696, 861 P.2d 460 (1993). Probable cause to arrest exists

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where reasonably trustworthy facts and circumstances within the knowledge of police are sufficient to merit a belief in the mind of a reasonably cautious person that an offense has been committed. *State v. Terrovona,* 105 Wn.2d 632, 643, 716 P.2d 295 (1986). Courts give consideration to the totality of circumstances as well as to the special expertise of police in identifying criminal behavior. *State v. Scott,* 93 Wn.2d 7, 11, 604 P.2d 943 (1980). Under Washington Constitution article 1, section 7 and the Fourth Amendment of the United States Constitution, evidence obtained in the course of unlawful government conduct must be suppressed. Such evidence is inadmissible in any Washington court for any purpose. *State v. Chenoweth,* 160 Wn.2d 454, 473, 158 P.3d 595 (2007); *Wong Sun v. United States,* 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

The police invaded the home of Reed and Mower to investigate a suspected marijuana grow. They had a warrant to search, but it is undisputed that Mr. Reed announced immediately that this was medical marijuana and that he and Ms. Mower were authorized to grow it. Nevertheless, the police immediately arrested Mower and Reed and clapped them in handcuffs, before even beginning to execute the search warrant. This was a flagrant violation of Mower's right to be free from

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unlawful seizure. Therefore, the evidence seized was subject to automatic suppression under Wash. Const. art 1, § 7 and the Fourth Amendment.

First, the police had no probable cause to arrest Mower at this point, because they had not even begun to search. All they had was an anonymous tip and a whiff of marijuana on the breeze in the vicinity of the property. This may have been grounds to search, but it was not probable cause to arrest. Probable cause to arrest was still conjectural. It could be expected to materialize, if at all, only after a search disclosed actual evidence of an actual crime.

Second, the version of the Medical Marijuana Act in existence in January, 2008, contained the following language:

> Qualifying patients with terminal or debilitating illnesses who, in the judgment of their health care professionals, may benefit from the medical use of marijuana, shall not be found guilty of a crime under state law for their possession and limited use of marijuana.

RCW 69.51A.005. Also, such persons "shall be considered to have engaged in activities permitted by this chapter and shall not be penalized in any manner, or denied any right or privilege, for such actions." RCW 69.51A.040(2). If this was not clear enough, in 2011, the Legislature clarified its intent with regard to arresting medical marijuana patients as follows:

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> The medical use of cannabis in accordance with the terms and conditions of this chapter does not constitute a crime and a qualifying patient or designated provider in compliance with the terms and conditions of this chapter may not be arrested, prosecuted, or subject to other criminal sanctions or civil consequences, for possession, manufacture, or delivery of, or for possession with intent to manufacture or deliver, cannabis under state law[.]

New RCW 69.51A.140, Engrossed Second Substitute Senate Bill 5073, Chapter 181, Laws of 2011.

Thus, even under the earlier version, once Mr. Reed put the police on notice that he and Mower were qualifying medical marijuana patients engaged in lawful activity, art. 1, § 7, and the Fourth Amendment required the police to make the relevant enquiries set forth in the Act to determine whether this couple were or were not subject to arrest, prosecution, or other criminal sanctions for possession of cannabis under state law. The statute specifically instructs the police to question suspected growers in order to elicit their status as medical marijuana patients or providers. RCW 69.51A.040(3)(c).

The police made no attempt to ascertain the status of Mower or Reed to determine whether they could be lawfully seized. Therefore, the arrest was unlawful. Therefore, the evidence seized in the course of the arrest was fruit of the poisonous tree and should have been suppressed.

The remedy is to reverse the conviction.

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Interestingly, one of the State's witnesses compared the statutory requirement that suspects produce a medical marijuana authorization on demand to that requiring proof of motor vehicle insurance. RP 359-60.[6] The comparison is instructive as to the legislative intent. When pulled over, a driver must provide written proof of insurance (or other means of financial responsibility) upon the officer's request. RCW 46.30.020(1)(a). Failure to produce proof of insurance on demand is an infraction that creates the presumption the driver is uninsured. RCW 46.30.020(1)(c) & (d). But this presumption is rebuttable. The driver simply appears in person before the court and provides the requisite written evidence that he or she was in compliance at the time she was cited, and the failure-of-proof citation will be dismissed. RCW 46.30.020(2).

This makes sense, since it is not producing a document, but actually carrying insurance that is the primary purpose of the statute. It is equally silly to elevate the ability of medical marijuana patients to find their written authorization during the chaos and terror[7] of a police raid over the simple requirement that a physician have issued an authorization.

Also, in the latest legislative revision of the medical marijuana act, the new statute requires medical cannabis users to register with the

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[6] Witnesses are supposed to testify solely to the facts, not the law. *State v. Clausing*, 147 Wn.2d 620, 628, 56 P.3d 550 (2002).
[7] Mower and Reed feared the police would open fire, and begged them not to shoot their dogs. RP 291.

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Department of Health. Engrossed Second Substitute Senate Bill 5073, Chapter 181, Laws of 2011. This appears to recognize the unworkability of the old practice whereby medical users could not be prosecuted but were subject to the routine practice of the police, upon mere suspicion that marijuana was being grown, to conduct a raid with guns drawn and to arrest the property-owners instantaneously before even executing the search warrant.

Mower and Reed were subjected to an unlawful arrest in violation of the clear language of chapter 69.51A RCW and contrary to the intent of the legislature, then or now. The evidence seized pursuant to that arrest was inadmissible in any Washington court for any purpose.

The remedy is to reverse and dismiss the prosecution, because without the physical evidence, the State had no evidence at all.

3. TRIAL COUNSEL WAS INEFFECTIVE FOR NOT MOVING TO SUPPRESS THE EVIDENCE.

Trial counsel did not seek to suppress the physical evidence seized during the unlawful arrest. However, this Court will address claim of manifest constitutional error for the first time on appeal. RAP 2.5(a)(3). Admitting unlawfully seized evidence is a manifest constitutional error.

Moreover, this Court will review a claim of constitutional error in the context of an ineffective assistance claim, provided the record is

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sufficiently developed to permit review. *State v. Soonalole,* 99 Wn. App. 207, 215, 992 P.2d 541 (2000).

This court employs the familiar standard for ineffective assistance set forth in *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) and *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995), to determine (1) whether counsel's conduct constituted deficient performance and (2) whether the conduct resulted in prejudice.

The Court will not consider a claim of ineffective assistance where a plausible argument can be made that trial counsel's conduct was reasonable trial strategy. *State v. Grier,* 171 Wn.2d 17, 246 P.3d 1260 (2011). The Court generally assumes counsel's decisions were strategic. But Appellant can overcome this presumption by establishing the absence of any "conceivable legitimate tactic explaining counsel's performance." *Grier,* 171 Wn.2d at 42. It is per se deficient performance to neglect to bring a dispositive motion that likely would have been granted. *McFarland,* 127 Wn.2d at 335; *State v. Rainey,* 107 Wn. App. 129, 136, 28 P.3d 10 (2001); *State v. Meckelson,* 133 Wn. App. 431, 135 P.3d 991 (2006).

Assuming the court was conversant with the law, a timely motion likely would have been granted and no conceivable strategic reason can be

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conceived for not moving to suppress. The search and seizure violation was manifest, and effective counsel would have moved under CrR 3.6 to suppress the physical evidence, without which the prosecution could not have been sustained.

The adequacy of the trial record is established in this case. The record developed in excruciating detail the facts surrounding the search and seizure of Mower and Reed. Moreover, no plausible argument can be made that failing to seek suppression was a reasonable strategic decision.

The defense theory of the case was that Mower and Reed, as qualifying patients under the Medical Marijuana Act, were not subject to arrest or prosecution for cultivating their marijuana. Yet, despite evidence that a squad of police officers invaded Mower's home at gunpoint and immediately seized her and handcuffed her, ignoring a clear invocation of the Medical Marijuana Act, counsel failed to challenge the legality of the arrest or to seek suppression of the unlawfully-obtained fruit of that arrest.

The remedy is to reverse the conviction.

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4. THE COURT GAVE THE JURY AN ERRONEOUS INSTRUCTION AS TO THE BURDEN OF PROOF ON THE AFFIRMATIVE DEFENSE OF MEDICAL USE.

A burden of persuasion wrongly placed upon a defendant implicates constitutional rights of due process of law under the Sixth and Fourteenth Amendment to the United States Constitution and Const. art 1, § 22. *State v. Deal,* 128 Wn.2d 693, 698, 911 P.2d 996 (1996); *State v. Hanna,* 123 Wn.2d 704, 710, 871 P.2d 135, *cert. denied,* 513 U.S. 919 (1994). Accordingly, review is de novo. *State v. Eckblad,* 152 Wn.2d 515, 518, 98 P.3d 1184 (2004)

The trial court instructed the jury that Mower and Reed had the burden to prove the affirmative defense of medical use by a preponderance of the evidence. Instr. 14, CP 45. This was wrong. The court unambiguously stated that the defense had made a prima facie showing of each element of the medical use defense to the satisfaction of the court. RP 221, 846. Once that happened, the burden shifted to the prosecution to prove the absence of every element of the defense beyond a reasonable doubt.

As a preliminary matter, Mower's counsel did not object to the burden of proof instruction below. Failing to object to an instruction may bar review. *State v. Scott,* 110 Wn.2d 682, 686, 757 P.2d 492 (1988). But

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a party may raise a manifest error of constitutional magnitude for the first time on appeal. RAP 2.5(a)(3). An instruction that shifts the burden of proof from the State is such a constitutional error. *Scott,* 110 Wn.2d at 688, n.5. This Court will consider a claimed error in an instruction where, as here, instructional error invades a fundamental right of the accused. *State v. Green*, 94 Wn.2d 216, 231, 616 P.2d 628 (1980).

Requiring the State prove each essential element of a crime beyond a reasonable doubt is a due process right guaranteed under the United States Constitution. U.S. Const. amends. V, XIV; *Winship,* 397 U.S. at 364; *Baeza,* 100 Wn.2d at 488 (1983). It is reversible error to instruct the jury in a manner that relieves the State of its burden to prove every essential element of a criminal offense beyond a reasonable doubt. *State v. Pirtle,* 127 Wn.2d 628, 656, 904 P.2d 245 (1995).

The Legislature expressly requires defendants to prove certain affirmative defenses by a preponderance of the evidence. Examples include: insanity, RCW 9A.12.010(2); felony murder, RCW 9A.32.030(1)(c); kidnapping, RCW 9A.40.030(2); sexual offenses, RCW 9A.44.030; reckless burning, RCW 9A.48.060; and compounding a crime, RCW 9A.76.100. Without exception, these statutes include unequivocal language that the defendant must prove the defense by a preponderance.

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But Washington's criminal code should be interpreted to safeguard "conduct that is without culpability" from prosecution. RCW 9A.04.020(1)(b); *State v. McCullum,* 98 Wn.2d 484, 493, 656 P.2d 1064 (1983). Accordingly, the burden of disproving certain affirmative defenses falls to the State. Homicide committed in the course of self-defense, for example, is a lawful act. RCW 9A.16.050. Therefore, in a prosecution for homicide, once a defendant makes out a prima facie case of self defense, he or she is relieved of the burden of further proving the defense. The burden shifts to the State to prove the absence of self-defense beyond a reasonable doubt.

This Court discusses this distinction in *State v Dow,* Slip Op. 39870-2, 2011 WL 2462020, ___ Wn. App. ___, ___ P.3d ___ (2011). There, the Court distinguished a claim of duress — which provides an excuse for unlawful conduct — with self-defense, which is based on performing a lawful act. *Dow,* Slip Op. 39870-2-II at 6. *Dow* compares *State v. Frost,* 160 Wn.2d 765, 773-74, 161 P.3d 361 (2007), *cert. denied,* 552 U.S. 1145 (2008) and *State v. Riker,* 123 Wn.2d 351, 368, 869 P.2d 43 (1994) (duress admits the defendant committed an unlawful act), with *State v. Box,* 109 Wn.2d 320, 329, 745 P.2d 23 (1987) (self-defense is a lawful act). Where the Legislature does not clearly impose the burden of proving an affirmative defense on criminal defendants, the Court may

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conclude that the obligation to prove the absence of the defense remains at all times with the prosecution. *McCullum,* 98 Wn.2d at 494, citing *State v. Roberts,* 88 Wn.2d 337, 345, 562 P.2d 1259 (1977).

The medical marijuana affirmative defense is in the self-defense category. The Legislature unambiguously has states that otherwise culpable conduct — such as cultivating and possessing marijuana — is lawful if it is done for medical purposes. RCW 69.51A.005. The whole point of the medical marijuana act is to establish circumstances wherein possession and use of marijuana are lawful acts. The Act does not impose the burden of proving the defense on defendants. Accordingly, the burden was with the State from the outset. At minimum, the burden shifted to the State to disprove each element of the defense beyond a reasonable doubt once the court accepted the prima facie case.

Hundreds of pages of this trial record are devoted to the court's painstaking inquiry into whether the defendants could make a prima facie showing that they were entitled to assert the defense. The sole point of this exercise was to determine which side had the burden of proof.

Therefore, according to statute, the cultivation and possession of marijuana by Mower and Reed constituted lawful conduct, unless the State proved the absence of the medical use defense beyond a reasonable doubt. That means the absence of each facet of the defense was an essential

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element of the offense that the State had to prove and the jury had to find beyond a reasonable doubt. It was error to instruct the jury the defendants had to prove medical use by a preponderance once they established their prima facie case to the satisfaction of the court.

This fundamental instructional error requires reversal.

5. THE COURT FAILED TO INSTRUCT THE JURY IT MUST BE UNANIMOUS ON WHICH ELEMENT OF LAWFUL MEDICAL USE THE STATE HAD DISPROVED BEYOND A REASONABLE DOUBT.

This Court will consider instructional error — such as failing to give a unanimity instruction — for the first time on appeal where the failure to request an instruction invades a fundamental right of the accused. *Green*, 94 Wn.2d at 231.[8]

The court's instructions to the jury must make the applicable legal standard "manifestly apparent" to the average juror. *State v. Borsheim,* 140 Wn. App. 357, 366, 165 P.3d 417 (2007). Whenever the State must prove and a jury must find a fact beyond a reasonable doubt, the jury must be unanimous as to that finding. That cannot happen unless the jury receives a unanimity instruction. Failing to require a unanimous verdict is a manifest constitutional error that can be raised for the first time on

[8] Moreover, RAP 2.5(a)(3) gives this Court discretion to accept an issue for review in the interests of justice. *State v. Russell,* 171 Wn.2d 118, 122, 249 P.3d 604 (2011).

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appeal. *State v. Carothers,* 84 Wn.2d 256, 262, 525 P.2d 731 (1974). "Instructional error is presumed to be prejudicial unless it affirmatively appears to be harmless." *State v. Stein,* 144 Wn.2d 236, 246, 27 P.3d 184 (2001). Where, as here, an instructional error favors the prevailing party, prejudice is presumed unless it affirmatively appears that the error was harmless. *State v. Bray,* 52 Wn. App. 30, 34-35, 756 P.2d 1332 (1988); *State v. Chino,* 117 Wn. App. 531, 540, 72 P.3d 256 (2003).

Mower's jury was not instructed that it must be unanimous as to which element of the medical use defense it found the State had proved the absence of beyond a reasonable doubt.

The State argued that Mower, desperately ill though she might have been, failed to prove that she was a qualifying patient on the basis of intractable pain or nausea that could not be relieved by standard therapies. The State also claimed she failed to prove she had valid documentation by spontaneously presenting an authorization to the police during the invasion of her home. Finally, the State claimed that Mower failed to prove she and Reed between them possessed no more than a 60-day supply of marijuana. RP 837, 914, 976-77, 978, 980, 981.

It cannot be discerned from the verdict which of these elements the jury found the State had proved the absence of beyond a reasonable doubt so as to defeat the medical use defense. At sentencing, counsel was at a

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loss as to which element of the affirmative defense had failed. "The jury may have believed that they had too much marijuana or something like that, I don't know what the problem was." RP 1035. The court asserted that the jury found that Mower and Reed had exceeded the permissible amounts of marijuana. RP 1046. But the jury was not polled. RP 996. There is simply no basis for this; it is pure speculation.

On this record, Ms. Mower's conviction cannot stand. Without an instruction, this Court has no reason to suppose that twelve jurors unanimously agree that one or more specific elements of the defense were absent beyond a reasonable doubt.

The Court should reverse the conviction and dismiss the prosecution with prejudice.

6. MOWER AND REED WERE DENIED THE RIGHT TO PRESENT A COMPLETE DEFENSE.

The defense moved in limine to admit evidence that within the last few years Mr. Reed had obtained legal advice in an effort to make sure that he and Mower were conducting themselves within the law. The court categorically refused to consider admitting this evidence. This was error.

First, the court violated court rules as well as the appearance of fairness by rejecting the proffered evidence sua sponte without even

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inviting argument from the State. All evidence is admissible unless the opposing party objects to it. ER 401; ER 403;

Second, the court erroneously categorized the evidence as hearsay. The evidence was not hearsay because it was not offered to prove the truth of matter asserted. As defense counsel explained, by there mere existence without regard to the soundness of the legal advice they contained, the documents were relevant to prove that Mower and Reed were bona fide medial marijuana patients who were making a good faith effort to abide by the law.

Third, the prosecutor opened the door to this evidence by impugning the professional integrity of Dr. Carter. RP 727. He also insinuated — based on no evidence whatsoever — that Dr. Orvald, another physician who authorized Mower and Reed to use marijuana, was some sort of unprincipled quack. RP 701, 703.

This error was not harmless. We have no way of knowing on what basis the jury rejected the medical use defense. It is as likely to have been because of questions about the legitimacy of the physicians' authorizations as for any other reason.

The remedy is to reverse for a new trial.

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7. THE TRIAL COURT ABUSED ITS DISCRETION IN IMPOSING COMMUNITY CUSTODY.

When a sentencing court acts without statutory authority, the error can be addressed for the first time on appeal. *State v. Anderson,* 58 Wn. App. 107, 110, 791 P.2d 547 (1990). The court's sentencing authority is the Sentencing Reform Act (SRA), Chapter 9.94A RCW. Court reviews de novo whether a trial court exceeded its statutory authority under the SRA. *State v. Murray,* 118 Wn. App. 518, 521, 77 P.3d 1188 (2003).

The jury acquitted Ms. Mower of Count 2. RP 996, 1031. Mower faced sentencing, therefore, solely on Count 1, unlawful manufacture of a controlled substance. CP 7. Her offender score, like that of Mr. Reed, was zero. RP 1031. Therefore, her standard range sentence was 0 to 6 months. RP 1031. The State recommended 45 days with 30 converted to electronic home monitoring. The State also requested "all standard and reasonable court cost, fines and legal financial obligations." RP 1032.

Mower asked the court to substitute electronic home monitoring for the jail time. In Mower's case, this would somehow have to accommodate her need for frequent MRI (magnetic resonance imaging) scans, a medical procedure that is incompatible with metal accessories. RP 1040. The court sentenced Mower to 20 days, all converted to electronic monitoring or community service. CP 9; RP 1047.

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Mower also asked the court to waive community custody or to grant permission for her to continue the therapeutic use of marijuana if the court did impose community custody. RP 1041. The court believed that a term of community custody subject to standard conditions under the supervision of the Department of Corrections (DOC) (a) was mandatory and (b) would necessarily preclude Mower from possessing medical marijuana. RP 1047-48. The court nevertheless imposed 12 months of community custody. CP 10. This was error.

The SRA Is Permissive. In sentencing a person to community custody, the court must abide by RCW 9.94A.701 and 9.94A.702. RCW 9.94A.505(1) and (2)(a)(ii).

RCW 9.94A.701 mandates that the court impose a one-year term of community custody if the defendant is sentenced to the custody of the DOC on a conviction under RCW 69.50. RCW 9.94A.701(3)(c). RCW 9.94A.702, by contrast, says the court MAY impose community custody for one year if the defendant is sentenced to less than one year of confinement (no custodian specified) for violating RCW 69.50. RCW 9.94A.702(1)(d).

The court did not sentence Mower to the custody of the DOC. By the plain language of the Judgment and Sentence, the court imposed 20 days confinement in the county jail. CP 9, para. 4.1(a). Therefore, the

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applicable community custody provision was the permissive RCW 9.94A.702, whereby the court had the discretion to waive community custody.

The court also erroneously thought the standard conditions of community custody would prevent Ms. Mower from using her medicinal marijuana. But the conditions imposed preclude solely the unlawful possession of a controlled substance. CP 10, para. 4.2(5). Nothing in the judgment forbids any lawful conduct such as possession of medical marijuana.

By the terms both of the SRA and the Judgment and Sentence, therefore, the court had the discretion either to waive community custody entirely, or to authorize Mower to possess marijuana lawfully under RCW 69.51A.

The court must strictly follow the statutory provisions, otherwise, the sentence is void. *State v. Phelps,* 113 Wn. App. 347, 354-55, 57 P.3d 624 (2002), quoting *State v. Theroff,* 33 Wn. App. 741, 744, 657 P.2d 800, *review denied,* 99 Wn.2d 1015 (1983). The remedy is to remand for resentencing.

The court here erroneously thought it had to impose community custody despite the judge's serious misgivings about consigning Ms. Mower to the supervision of the DOC. RP 1041, 1047. So the court both

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imposed community custody and did not impose it, by granting a stay of execution of the judgment and essentially punting the issue to this Court. RP 1048. In the event the Court upholds the conviction, Ms. Mower ask the Court to remand with instructions to strike the community custody provisions of the sentence.

8. THE COURT IMPOSED EXCESSIVE COSTS IN VIOLATION OF RCW. 10.01.160(2).

Counsel objected strenuously to the State's exorbitant cost bill. RP 1050. Specifically, the court imposed a legal financial obligation of $2,129.00 to reimburse the Sheriff's Office for serving subpoenas. CP 12, para 4.3(a); RP 1050. This was error.

RCW 10.01.160(2) authorizes the court to impose certain prosecution expenses on a convicted defendant. The statute does not permit the State to recoup costs associated with maintaining government agencies, unless those costs are specific to a particular case. *Utter v. Dep't of Soc. & Health Servs.,* 140 Wn. App. 293, 309-11, 165 P.3d 399 (2007).

In *Utter,* the Department of Social and Health Services tried to bill a defendant for costs expended in determining his competency to stand trial. This contravened RCW 10.01.160(2) which unequivocally bars costs for expenditures the State incurs "in connection with the maintenance and operation of government agencies that must be made by the public

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irrespective of specific violations of law." *Utter,* 140 Wn. App. at 309-10. *Utter* also held that recoverable expenses do not include the salaries of prosecuting attorneys. *Utter,* 140 Wn. App. at 309-10, quoting *State v. Fuller,* 12 Or. App. 152, 157-58, 504 P.2d 1393 (1973), *aff'd,* 417 U.S. 40, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974). This is because the prosecutor's salary must be paid irrespective of a defendant's specific case. *Utter,* 140 Wn. App. at 310-11.[9]

The same reasoning applies to the State's attempt to recoup the routine costs of maintaining the Sheriff's Office. Specifically, the Sheriff's Office receives a publicly-financed budget that includes the cost of paying personnel at a fixed hourly or monthly rate to perform routine tasks such as serving subpoenas. Those people are on salary and will be paid irrespective of any particular prosecution. If they were not serving subpoenas, they would be sitting around at public expense doing crossword puzzles. Even more so, RCW 10.01.160(2) bars the State from billing indigent defendants for serving dozens of subpoenas on the same police witnesses in cases with multiple continuances. Besides that, the record contains no explanation of why the Sheriff could not have served a

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[9] The same rule holds true on appeal. The State cannot recover salaries and other public expenditures that would be made irrespective of specific violations of the law as costs on appeal. *In re Pers. Restraint of Bailey,* ___ Wn. App. ___, ___ P.3d ___ (2011), Slip Op. No. 28652-5-III at 6, citing RCW 10.73.160(2).

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fistful of subpoenas in a single visit to the police department. If the police department does not have an agent to receive service of process, penalizing indigent defendants is not a lawful alternative. At minimum, the State should not be permitted to double dip by assessing two indigent defendants tried jointly for a single series of subpoenas served on the same witnesses.

The Court should remand for resentencing with instructions to strike all costs that are not particular to Mower's prosecution, including the service of subpoenas by Sheriff's Office staffers whose salaries have already been paid by the tax payers.

V. CONCLUSION

For the foregoing reasons, Karen L. Mower asks this Court to reverse her conviction, vacate the judgment and sentence, and dismiss the prosecution.

Respectfully submitted this 23rd day of June, 2011.

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CERTIFICATE OF SERVICE

Jordan McCabe certifies that she mailed this day, first class postage prepaid, a copy of this Appellant's Brief to:

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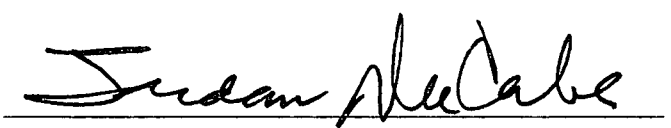

June 23, 2011

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